

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of:)	
)	
Wyomedia Corporation)	
)	CSR-5840-N
For Waiver of §76.101 of the)	
Commission's rules)	

MEMORANDUM OPINION AND ORDER

Adopted: October 15, 2002

Released: October 18, 2002

By the Deputy Chief, Media Bureau:

I. INTRODUCTION

1. Wyomedia Corporation, licensee of television broadcast station KLWY (Ch. 27), Cheyenne, Wyoming ("KLWY"), has filed a petition for special relief seeking a waiver of the Commission's significantly viewed exception to the syndicated program exclusivity rules (47 C.F.R. §76.101). An opposition to this petition was filed on behalf of KWGN, Inc., licensee of station KWGN-TV (Ch. 2), Denver, Colorado ("KWGN-TV"), to which KLWY has replied. For the reasons discussed below, we grant the petition.

II. BACKGROUND

2. Upon the request of a local station, and pursuant to the Commission's cable television syndicated programming exclusivity rules, a cable system may not import duplicating syndicated programming that has been purchased by the local station on an exclusive basis.¹ The Commission's rules in general provide stations such protection within a station's 35-mile geographic zone.² Under Section 76.92(f) of the Commission's rules, however, a local station may not exercise this right if an otherwise distant station is considered "significantly viewed" within the community served by the cable system.³ The significantly viewed exception to the Commission's exclusivity rules is based on an otherwise distant station establishing that it receives a "significant" level of over-the-air viewership in a subject community. If this viewership level is met, the station is no longer considered distant for purposes of the application of the Commission's exclusivity rules because it has established that it can be received over the air in the subject communities.

¹See 47 C.F.R. §76.101.

²The 35-mile geographic zone extends from the reference point of the community of license of the television station. See 47 C.F.R. §§73.658 and 76.53.

³See 47 C.F.R. §76.101.

3. Station KLWY seeks a waiver of the significantly viewed exception to the Commission's syndicated exclusivity rules so that it may enforce its rights to syndicated exclusivity against KWGN-TV. KWGN-TV is currently considered to be significantly viewed in Laramie County, Wyoming, where the community of Cheyenne, served by AT&T Cable, is located.

4. In *KCST-TV, Inc.*, the Commission held that in order to obtain a waiver of Section 76.92(f) of the Commission's rules, petitioners would be required to demonstrate for two consecutive years that a station was no longer significantly viewed, based either on community-specific or system-specific noncable viewing data, to one standard error.⁴ For each year, the data must be obtained as a result of independent professional surveys taken during two one-week periods separated by at least thirty days, the viewing samples must be distributed proportionately among the relevant cable communities, and not more than one of the surveys may be taken between April and September of each year.⁵ The Commission has found that this type of test is applicable as well for waivers of the syndicated exclusivity exemption.⁶

III. DISCUSSION

5. In support of its petition, KLWY states that it has syndicated exclusivity rights in the Cheyenne, Wyoming designated market area ("DMA"), but is prevented from asserting those rights against KWGN-TV on the Cheyenne cable system operated by AT&T because KWGN-TV is considered to be significantly viewed in Laramie County, where the cable system is located.⁷ In support of its requested waiver, KLWY has submitted the results of independent professional surveys conducted by Nielsen Media Research for two cycles in February 2000 and two cycles in May 2001, the results of which demonstrate that KWGN-TV is no longer significantly viewed in Cheyenne, Wyoming.⁸

6. In opposition, KWGN-TV argues that KLWY's petition should be dismissed because the station has failed to make the required evidentiary showing documenting that KWGN-TV is no longer significantly viewed in Cheyenne, Wyoming.⁹ KWGN-TV points out that, under the Commission's rules and applicable precedent, a station seeking waiver must demonstrate for two consecutive years that a distant station is no longer significantly viewed, based on either community-specific or system-specific noncable viewing data, to one standard error, and for each year the data must be the result of professional surveys taken during two one-week periods, separated by at least thirty days.¹⁰ KWGN-TV states that although KLWY identifies data from "two cycles in February 2000 and two cycles in May 2001," the data submitted indicates that there was only one cycle in February and one cycle in May 2001.¹¹ KWGN-TV argues that KLWY's showing contains the following additional errors: i) although there are two

⁴103 FCC 2d 407 (1986). This waiver criteria pertains to syndicated exclusivity protection as well. *See* 47 C.F.R. §76.101.

⁵*See* 47 C.F.R. §76.54(b).

⁶*See Chambers Cable of Oregon, Inc.*, 5 FCC Rcd 5640 (1990).

⁷Petition at 1-2.

⁸*Id.* at Exhibit A.

⁹Reply at 1.

¹⁰*Id.* at 2, citing *KCST-TV, Inc.*, 103 FCC 2d 407 (1986); *Grapevine of Austin License Sub, LLC*, 15 FCC Rcd 7349 (2000).

¹¹Petition at 3.

attachments provided with the Nielsen letter submitted by KLWY, only one attachment regarding May 2001 survey results actually pertains to KWGN-TV;¹² ii) KLWY fails to provide data from surveys taken during two one-week periods separated by at least thirty days for the years 2000 and 2001; iii) it is not clear whether KLWY is submitting a community-specific or system-specific survey because the audience analysis provided by KLWY, which apparently covers the AT&T system serving Cheyenne, identifies nine separate zip codes but does not identify the communities associated with each zip code or provide any audience data associated with each zip code; and iv) if it is submitting a system-specific survey, KLWY fails to include evidence that the sample is proportional to the population of each of the zip codes served by the cable system.¹³ For the foregoing reasons, KWGN-TV asserts that KLWY's petition should be denied.

7. In reply, KLWY concedes that it inadvertently included unrelated and/or incomplete survey information in its petition and it submits additional ratings herein to correct any discrepancies in its showing.¹⁴ Moreover, KLWY states that KWGN-TV was in error when it claimed that KLWY's viewership surveys were not community-specific.¹⁵ KLWY states that the data submitted are the results of a community-specific Nielsen tabulation based on noncable homes from the nine zip codes that cover the community of Cheyenne.¹⁶ KLWY points out that the Commission recognized the validity of the same Cheyenne market analysis in *KWGN-TV*, which used the same nine zip codes in its analysis.¹⁷ KLWY concludes that KWGN-TV's share of total viewing hours in noncable homes in Cheyenne falls below the required 3 percent minimum, within one standard error, as shown in the table below:

<u>Survey Year</u> ¹⁸	<u>Households Studied</u>	<u>Share Viewing Hours</u>	<u>Standard Error</u>	<u>Net Weekly Circulation</u>	<u>Standard Error</u>
Feb. 00	32	0.6	0.36	7.3	4.42
May 00	34	1.1	0.66	7.6	4.39
Feb. 01	30	0.3	0.13	10.2	4.71
May 01	26	0.0	0	0	0

¹²Reply at 2. KWGN-TV states that the second attachment refers to station KMGH-TV (Ch. 7), Denver, Colorado.

¹³*Id.* at 3-4.

¹⁴Reply at 1, n. 1. We note that KWGN-TV filed a response to KLWY's reply, objecting to KLWY's submission of corrected data, arguing that its inclusion at this stage did not allow it to adequately assess the showing and make a reasoned response. KWGN-TV maintained that the Bureau should reject the new survey data and dismiss KLWY's petition. Should the Bureau accept the additional information, however, KWGN-TV requested that it be allowed a 30-day period in which to review and respond to the new evidence. Bureau staff contacted counsel for KWGN-TV indicating that any further response would be considered. To date, however, KWGN-TV has not provided any further comments.

¹⁵*Id.* at 2.

¹⁶*Id.*

¹⁷*Id.* at 2-3.

¹⁸The survey dates of February 2000/May 2000 and February 2001/May 2001 meet the criteria set forth in the rules and *KCST-TV* that the two one-week surveys be separated by at least 30 days and that both surveys may not occur between April and September.

As a result, KLWY requests that the Commission grant its petition so that it can assert its syndicated exclusivity rights in the subject community.

8. We find that, as required by the Commission, KLWY has provided two sets of community-specific survey results for the community of Cheyenne, Wyoming, for each year surveyed. Section 76.5(i) of the Commission's rules requires that for network stations to be considered significantly viewed, the survey results should exceed a 3 percent share of total viewing hours and a net weekly circulation of 25 percent, by at least one standard error.¹⁹ The February 2000 reported results for KWGN-TV, with one standard error added, are 0.42 percent share of total viewing hours and a 11.72 percent net weekly circulation; for May 2000 the shares are 1.76 percent share of total viewing hours and a net weekly circulation of 11.99 percent. For February 2001, the reported results for KWGN-TV with the standard errors added are 0.43 percent share of total viewing hours and a net weekly circulation of 14.91 percent; for May 2001, all the reported shares are 0. For both years, the share of total weekly viewing hours and the net weekly circulation both fall below the required 3 percent and 25 percent minimums for significantly viewed status when the standard errors are considered. Accordingly, we find that the submitted audience surveys are sufficient to show that KWGN-TV no longer attains the viewing levels needed to demonstrate significantly viewed status in the community of Cheyenne, Wyoming.

9. For the above reasons, we find that a grant of a waiver of the significantly viewed exception from the syndicated exclusivity rules with regard to the community-specific survey for Cheyenne, Wyoming, will serve the public interest.

IV. ORDERING CLAUSES

10. Accordingly, **IT IS ORDERED**, that the petition filed by Wyomedia Corporation **IS GRANTED**.

11. This action is taken pursuant to authority delegated under Section 0.283 of the Commission's rules.²⁰

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Media Bureau

¹⁹ 47 C.F.R. §76.5(i).

²⁰ 47 C.F.R. §0.283.